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Inc.*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL)  
ANTITRUST LITIGATION

No. M 07-1827 SI  
MDL No. 1827

This Document Relates to:  
ALL CASES

**TOSHIBA CORPORATION'S,  
TOSHIBA MATSUSHITA DISPLAY  
TECHNOLOGY CO., LTD.'S,  
TOSHIBA AMERICA ELECTRONIC  
COMPONENTS, INC.'S AND  
TOSHIBA AMERICA INFORMATION  
SYSTEMS, INC.'S REPLY  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN RESPONSE TO  
PLAINTIFFS' OPPOSITIONS TO  
MOTION TO DISMISS**

**ORAL ARGUMENT REQUESTED**

Date: April 30, 2008  
Time: 2:00 p.m.  
Dept.: Courtroom 10, 19th Floor  
Judge: Hon. Susan Illston

Toshiba Corporation (“Toshiba”), Toshiba Matsushita Display Technology Co., Ltd. (“TMD”), Toshiba America Electronic Components, Inc. (“TAEC”) and Toshiba America Information Systems, Inc. (“TAIS”) respectfully submit this reply memorandum of points and authorities in response to Direct Purchaser Plaintiffs’ Opposition to Defendants’ Joint and Separate Motions to Dismiss (hereinafter “D-P Opposition Brief”) and the Indirect Purchaser Plaintiffs’ Memorandum in Opposition to Defendants’ Motions to Dismiss Consolidated Amended Complaint (hereinafter “I-P Opposition Brief”) (collectively, the “Oppositions”).<sup>1</sup>

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **A. Plaintiffs’ Failure to Allege Any Facts That Plausibly Suggest That Toshiba, TMD, TAEC and TAIS Have Participated in a Conspiracy Requires Dismissal of the Complaints**

In their opening Motion to Dismiss and Memorandum of Points and Authorities (hereinafter “Opening Motion”), Toshiba, TMD, TAEC and TAIS demonstrated that the Direct Purchaser Plaintiffs’ Consolidated Complaint, dated November 5, 2007 (the “Direct Purchasers’ Complaint”) and the Indirect Purchaser Plaintiffs’ Consolidated Amended Complaint, dated November 5, 2007 (the “Indirect Purchasers’ Complaint”) (collectively, the “Complaints”), failed to satisfy the pleading standard set forth by the Supreme Court in Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007). Far from alleging specific evidence of conspiratorial activity, the Complaints are rife with conclusory, generalized statements about the alleged conspiratorial behavior of all co-defendants. See, e.g., Direct Purchasers’ Complaint at ¶¶ 4, 90, 91, 98, 100, 170; Indirect Purchasers’ Complaint at ¶¶ 1-2, 8-10, 137-38, 178. The Plaintiffs failed to allege any facts suggesting that Toshiba, TMD, TAEC or TAIS were party to or participated in a conspiracy to fix prices. Moreover, the conclusory allegations that Plaintiffs did assert against

<sup>1</sup> Toshiba, TMD, TAEC and TAIS hereby incorporate by reference the Defendants’ Reply Memorandum in Support of Joint Motion to Dismiss Direct Purchaser Plaintiffs’ Consolidated Complaint and the Defendants’ Reply Memorandum in Support of Joint Motion to Dismiss Indirect Purchaser Plaintiffs’ Consolidated Amended Complaint.

1 Toshiba, TMD, TAEC and TAIS are equally consistent, if not more so, with independent,  
2 legitimate business activity, and therefore cannot support Plaintiffs' conspiracy claims.

3 Having been confronted with their clear failure of pleading, Plaintiffs now make the  
4 remarkable contention that they are not required to make specific allegations of participation in a  
5 conspiracy against Toshiba, TMD, TAEC or TAIS in order to survive a motion to dismiss. See I-  
6 P Opposition at 9-10; D-P Opposition at 23-29. This argument is untenable particularly after the  
7 Supreme Court's decision in Twombly, and the post-Twombly cases that Plaintiffs cite do not  
8 support their argument. In fact, these cases confirm the essential requirement set forth in  
9 Twombly: an antitrust plaintiff must allege specific facts that plausibly suggest the existence of a  
10 conspiracy, as well as each defendant's participation in that conspiracy. Twombly, 127 S. Ct. at  
11 1966-67. In In re OSB Antitrust Litig., 2007 WL 2253419 (E.D. Pa. Aug. 3, 2007), the court held  
12 that the "plaintiff must allege that each individual defendant joined the conspiracy and played  
13 some role in it." Id. at \*5 (emphasis added). Additionally, in In re Static Random Access  
14 Memory (SRAM) Antitrust Litig., 2008 WL 426522 (N.D. Cal. Feb. 14, 2008), the court found  
15 that plaintiffs were required to "make allegations that plausibly suggest that each Defendant  
16 participated in the alleged conspiracy." Id. at \*6 (emphasis added). Even under the case law that  
17 they have cited, Plaintiffs still bear the burden of alleging specific facts that plausibly suggest that  
18 Toshiba, TMD, TAEC and TAIS each individually participated in a conspiracy.

19 As set forth in the Opening Motion, Plaintiffs have failed to meet this standard. Plaintiffs  
20 have set forth no allegations that suggest that Toshiba, TMD, TAEC or TAIS joined in any  
21 conspiracy; no allegations identifying with whom they allegedly entered into a conspiratorial  
22 agreement; no allegations as to when they entered into any alleged agreement; no allegations that  
23 they attended any meetings in furtherance of any agreement; and no allegations setting forth the  
24 terms of the purported agreement, or how those terms were effectuated. Plaintiffs' Oppositions  
25 fail to address these pleading deficiencies.

**B. The Indirect Purchaser Plaintiffs Have Failed to Point to Any Specific Allegations Relating to Toshiba, TMD, TAEC or TAIS**

The I-P Opposition Brief does not even attempt to identify any specific allegations as to Toshiba, TMD, TAEC or TAIS. The Indirect Purchaser Plaintiffs rest, in part, on their contention that they do not need to make specific allegations on a defendant-by-defendant basis. See I-P Opposition Brief at 9-10. As set forth in the Opening Motion and above, the Indirect Purchaser Plaintiffs' failure to set forth any specific allegations of conspiratorial activity on the part of Toshiba, TMD, TAEC or TAIS requires dismissal of the Indirect Purchasers' Complaint as to them.

**C. The Direct Purchaser Plaintiffs Have Failed to Point to Any Specific Allegations Relating to TMD, TAEC or TAIS, and the Only Factual Allegations as to Toshiba Are Insufficient to Defeat a Motion to Dismiss**

The only allegations in the D-P Opposition Brief that actually mention Toshiba, or a Toshiba entity, relate to (i) participation in trade associations; and (ii) the IPS Alpha venture. The Direct Purchaser Plaintiffs allege that "Toshiba" participated in trade associations and that certain executives attended a 2006 conference.<sup>2</sup> See Direct Purchasers' Complaint at ¶¶ 159 & 168. Absent some evidence of conspiratorial conduct, these allegations do not support an inference of conspiracy. See Twombly, 127 S. Ct. at 1971 n. 12; In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007); In re Citric Acid Litig., 191 F. 3d 1090, 1098 (9th Cir. 1999) (participation in trade associations does not support "inference of conspiracy"); In re Late Fee and Over-Limit Fee Litig., 528 F. Supp. 2d 953, 963 (N.D. Cal. 2007). Because the Direct Purchaser Plaintiffs have not set forth any allegations that support "Toshiba's" involvement in any conspiracy, the allegations pertaining to participation in trade associations merely indicate innocuous business activities.

The Direct Purchaser Plaintiffs also allege that "Hitachi and Toshiba formed IPS Alpha as

<sup>2</sup> See Opening Motion at 3-4. Toshiba, TMD, TAEC and TAIS object to the Plaintiffs' inappropriate use of the term "Toshiba" to describe distinct corporate entities.

1 a joint venture in January 2005 to manufacture and sell TFT-LCD panels for televisions.” See D-  
 2 P Opposition Brief at 25. Notably, they further allege that “it is plausible to allege that the  
 3 formation of IPS Alpha was itself a conspiratorial act to curtail supply. . . [and] that joint ventures  
 4 and other business affiliations were the *means* to maintain and achieve the end result of the  
 5 conspiracy . . . .” D-P Opposition Brief at 26 (emphasis in original).

6 Again, these contentions are meaningless because Plaintiffs have failed to allege any  
 7 specific facts that plausibly suggest an underlying conspiracy. In light of this failure, this Court  
 8 must accept the allegations relating to the IPS Alpha venture for what they are: practices “just as  
 9 much in line with a wide swath of rational and competitive business strategy unilaterally  
 10 prompted by common perceptions of the market” as with conspiracy. Twombly, 127 S. Ct. at  
 11 1964. Participation in joint ventures and cross-licensing arrangements serves many pro-  
 12 competitive purposes, and does not, absent some evidence of a collusive agreement, support a  
 13 claim for conspiracy. See, e.g., Arista Records LLC v. Lime Group LLC, 532 F. Supp. 2d 556,  
 14 579 n. 30 (S.D.N.Y. 2007); In re Travel Agent Comm’n Antitrust Litig., 2007 WL 3171675, at \*9  
 15 (N.D. Ohio Oct. 29, 2007); Late Fee and Over-Limit Fee Litig., 528 F. Supp. 2d at 963.

16 Moreover, rather than curing the pleading deficiencies, the Plaintiffs’ allegations as to the  
 17 IPS Alpha venture highlight those deficiencies. As Plaintiffs indicate, the only Toshiba entity at  
 18 issue in the IPS Alpha venture is Toshiba Corporation. Direct Purchasers’ Complaint at ¶ 60  
 19 (“IPS Alpha was formed in January 2005 as a joint venture between defendants Hitachi Displays,  
 20 Ltd., Toshiba Corporation, and Matsushita Electric Industrial Co., Ltd. to manufacture and sell  
 21 TFT-LCD panels for televisions.”). As noted above, the only factual allegations that pertain to  
 22 any specific Toshiba entity are the IPS Alpha allegations. In short, there are no specific  
 23 allegations whatsoever as to TMD, TAEC or TAIS. Not only are the allegations in the Plaintiffs’  
 24 Complaints insufficient as to all of the Toshiba entities named in their Complaints, TMD, TAEC  
 25 and TAIS should be dismissed for the additional reason that the Complaints are devoid of any  
 26 specific allegations against them.

**CONCLUSION**

For the reasons stated above and based on the authorities cited herein and within the Opening Motion, Toshiba, TMD, TAEC and TAIS respectfully request this Court to grant their motion to dismiss for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

Dated: April 3, 2008

WHITE & CASE LLP

By: /s/ Wayne A. Cross

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With the Reservation of All Rights and Defenses.

Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from Wayne Cross.

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